116 Box 47 - JGR/Recess Appointments (3) – Roberts, John G.: Files SERIES I: Subject File

THE WHITE HOUSE
WASHINGTON

Date: July 26, 1984

MEMORANDUM FOR: John Peterson

FROM: PETER J. RUSTHOVEN
Associate Counsel to the President

ACTION:

- ☐ Please handle/review
- ☑ For your information
- ☐ For the files
- ☐ Please see me
- ☑ As we discussed
- ☐ Please return to me for filing

COMMENT:

Give me a call (456-6500) if you have any questions —

Thanks, Pete

Recess Appointments During Temporary Senate Recesses

- On this issue, to paraphrase Justice Holmes, a page of history is worth a volume of political rhetoric.

- The Constitution gives the President the power to make appointments when the Senate takes a recess -- and this is not limited only to final adjournments after a session.

- Presidents have often made such appointments when the Senate breaks for a few weeks during the middle of a session.

  -- President Carter made 17 direct appointments during temporary Senate breaks -- including a Cabinet member [Secretary of Transportation Neil Goldschmidt] and AFL-CIO head Lane Kirkland to the Board of the Synfuels Corporation

  -- President Truman made a dozen direct appointments during one temporary recess in 1950. */

- This issue was decided long ago. In the 1940's, the Comptroller General -- an officer of the Congress -- ruled that the President had power to make direct appointments during temporary as well as final recesses. [28 Comp. Gen. 30 (1948)] Attorneys General have agreed. [41 Op. Att'y Gen. 463 (1960); 33 Op. Att'y Gen. 20 (1921)] The courts have noted that "Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session." [Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979) (unsuccessful challenge to Carter recess appointment [after final adjournment] to FEC)]

- President Reagan didn't try to evade the Senate's power to confirm. Every person he appointed had already been nominated before the recent Senate recess -- the Senate just hadn't acted on the nominations. And every appointee was renominated when the Senate came back.

- President Reagan wasn't dodging the rules -- he was playing by them. If the Senate doesn't confirm these appointees, the Constitution says they can only serve until the end of the next session of the Senate. But the Constitution also makes it clear that President Reagan -- just like Presidents Carter, Truman and many others -- had every right to make these appointments.

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*/ President Kennedy had no chance to make any intra-session recess appointments, as the Senate took no mid-session recesses of more than 3 days during his entire time in office.

U.S. Department of Justice
Office of Legal Counsel

RECESS APPTS.

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

AUG 24 1984

MEMORANDUM FOR FRED F. FIELDING
Counsel to the President

Re: Possible Recess Appointment to the Federal Deposit Insurance Corporation

This responds to your memorandum of May 25, 1984, concerning the pay status of a recess appointee who would replace the present Chairman of the Board of the Directors of the Federal Deposit Insurance Corporation (FDIC). We have been advised that the term of the incumbent expired on March 15, 1984, but that he is currently holding over by virtue of a 1983 amendment to 12 U.S.C. § 1812. 1/ The President expects to replace the Chairman with a recess appointee during the recess of the Senate expected to begin in the early part of October 1984. 2/

1/ Section 1812 of title 12, United States Code, provides that "[e]ach . . . appointee shall hold office for a term of six years." Section 1812 was amended in 1983 to provide that a member appointed to the Board of Directors of the FDIC "may continue to serve after the expiration of his term until a successor has been appointed and qualified."

2/ Const. Art. II, § 2, cl. 3 provides:

> "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

It has been firmly established by a line of Attorney General opinions going back to 1823 (see 41 Op. A.G. 463, 465 (1960)), that the President has the power under this Clause to make recess appointments to fill vacancies that existed while the Senate was in session. This interpretation of the Recess Appointment Clause has been judicially upheld. Allocco v. United States, 305 F.2d 704, 709-15 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).

You have asked whether 5 U.S.C. § 5503, which generally provides 3/ that if the President makes a recess appointment to fill a vacancy that existed while the Senate was in session payment for the services of the recess appointee may not be made from the Treasury prior to confirmation, 4/ would preclude payment for the recess appointee's services prior to his confirmation.

While the matter is not entirely free from doubt, for the reasons hereafter set forth, we believe that a strong argument can be made to the effect that § 5503 would not prohibit the payment of the recess appointee's salary under the circumstances you have set forth. We note that § 5503 contains two operative elements: first, the requirement that the recess appointment would fill a vacancy that existed while the Senate was in session; and, second, that the payment for the services would be made from the Treasury. We discuss these operative elements seriatim and conclude that a vacancy has existed since the expiration of the incumbent's term, and that payment to a recess appointee would not be "from the Treasury" within the meaning of § 5503.

I.

A Vacancy Existed While the Senate Was in Session

We first deal with the question whether a vacancy existed while the Senate was in session. In its Advisory Opinion of April 5, 1983, B210-338, In the Matter of Personnel Practices within the Legal Services Corporation, the Comptroller General opined that 5 U.S.C. § 5503 is not applicable where the President makes a recess appointment to replace an incumbent whose term

3/ The full text of § 5503 is reproduced in the Appendix to this memorandum.

4/ There are three specific exceptions, not relevant to your request, to this general prohibition. Payment is not prohibited under § 5503 in circumstances in which:

(1) the vacancy arose within thirty days of the end of the session of the Senate;

(2) a nomination for the office was pending before the Senate at the time of the recess, and the recess appointee is not serving under a prior recess appointment; or

(3) a nomination to the office was rejected by the Senate within thirty days prior to the adjournment of the Senate, and the recess appointee is not the person whose nomination was rejected.

expired while the Senate was in session, but who continues to serve pursuant to a statutory authority. The opinion maintained that an office is not vacant while an incumbent holds over, and that a vacancy occurs in this situation only when the President replaces the incumbent with a recess appointee.

The Department of Justice generally has deferred to the interpretation of § 5503 and its predecessor provisions by the Comptroller General and his predecessor, the Comptroller of the Treasury. See 41 Op. A.G. 463, 473 (1960); 30 Op. A.G. 314, 316 (1914). In this case, however, we have difficulty accepting this interpretation of the term "vacancy," as helpful as it would be in this situation, because it is inherently contradictory, inconsistent with judicial precedent, and irreconcilable with the interpretation of the vacancy concept advanced by this Department.

First, it must be remembered that the making of a recess appointment presupposes the existence of a vacancy. Hence, if the Comptroller General were correct in his position that there is no vacancy while an office is occupied by a holdover officer, the President would lack the power to make a recess appointment at all. The opinion of the Comptroller General, however, assumes that the recess appointment is valid despite its conclusion that no vacancy exists pursuant to which such an appointment would be justified. Nor could it be said, despite the lack of a vacancy while the Senate was in session, that the recess appointment itself had the effect of creating a vacancy. The recess appointment power is based upon the existence of a vacancy, but a recess appointment does not create one. Peck v. United States, 39 Ct. Cl. 125 (1904); 23 Op. A.G. 30, 34-35 (1900); 3 Op. O.L.C. 314, 317 (1979). The conclusion of the Comptroller General--that there is no vacancy while an officer whose term has expired serves under a holdover clause--is therefore inconsistent with the exercise of the President's power, unquestioned by the Comptroller General, to replace the holdover officer by way of a recess appointment.

Second, the position of the Comptroller General is inconsistent with the judicially approved position of this Department: when an officer's term expires, his office becomes legally vacant. See Staebler v. Carter, 464 F. Supp. 585, 589-90 (D.D.C. 1979). The holdover clause is merely one of many devices permitting the temporary filling of the office.

The difference in the interpretations of statutory holdover clauses by the Department of Justice and by the Comptroller General is not a mere exercise in legalisms, but has an important constitutional consequence. As mentioned above, the President's

power to make a recess appointment presupposes the existence of a vacancy. Hence, if the President wishes to make such an appointment, the office must either be vacant, or the President must create the vacancy by removing the incumbent--provided, of course, that he has that power. 3 Op. O.L.C. 314, 317 (1979). This consideration becomes especially important where, as in Staebler v. Carter, supra, the President seeks to replace by way of recess appointment a holdover officer whom the President has no power to remove, absent cause, because the officer performs quasi-judicial or quasi-legislative functions. See Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Executor v. United States, 295 U.S. 602 (1935). In that situation, if a vacancy were not to occur when the incumbent's term expires, the President could not make a recess appointment.

In Staebler v. Carter, supra, the court held that a vacancy occurs when the incumbent's term expires. The court's opinion therefore upheld the President's authority to make a recess appointment in these circumstances. This prevents the Senate from perpetuating a holdover incumbent in office by failing to confirm his successor. Staebler v. Carter, 464 F. Supp. at 600-01. We believe it is important that the Executive Branch adhere to its position that a vacancy arises upon the expiration of a term, even when an incumbent may continue to serve under a holdover provision, and that this position not be compromised by accepting, where convenient, a contradictory interpretation of a holdover clause. We therefore conclude that the office of the Chairman of the Board of the FDIC became legally vacant when the incumbent's term expired.

II.

Payment would not be made "from the Treasury"

The second question derived from the language of § 5503 is whether payment for the services of the recess appointee would be made "from the Treasury of the United States."

In order to determine whether payment for the services of the Chairman of the Board of Directors of the FDIC is "made from the Treasury" within the meaning of 5 U.S.C. § 5503, it is necessary to ascertain the status of the FDIC and the source and nature of the funds from which salary payments to its chairmen are made. For purposes of chapter 91 of title 31, the FDIC is defined as a mixed-ownership Government corporation. 31 U.S.C. § 9101(2)(c). The Appendix to the Budget of the United States Government, FY 1985, I-Y22 (1984) [hereinafter "Appendix"] explains that the purposes of the FDIC are to provide protection for bank depositors and to foster sound banking

practices. The principal of the assets of the FDIC is derived exclusively from insurance assessments paid by insured banks and from the accumulated net income on its investments, not from tax revenues. See 12 U.S.C. §§ 1817, 1821(a). While the FDIC is authorized to borrow money from the Treasury, no borrowing under this authorization has been made up to now and, as far as we have been able to determine, none is expected in the immediate future.

Similarly, the income of the FDIC is derived from the assessments on insured banks and the interest on its investments. The entire funds of the FDIC, which are described as Trust Funds 5/, are reserved for the protection of depositors in insured banks and for the payment of insurance and administrative expenses; the latter expenses, of course, include the salaries of the FDIC's officers and employees. The Appendix states specifically that "no funds derived from taxes or Federal appropriations are allocated to or used by the Corporation in any of its operations." Id.

Arguments to the effect that the salaries of the Corporation's employees are paid from the Treasury could be based on two contentions: First, that salaries are paid from public funds that must be deposited in the Treasury and may be withdrawn from the Treasury "but in Consequence of Appropriations made by law," (Const. Art. I, § 9, cl. 7); and, second, that the FDIC makes payment for the services of its officers and employees by Treasury check. It is our conclusion, however, that the assets of the FDIC are not public funds for the purposes of § 5503, and that the salary payments of the FDIC by checks drawn on the Corporation's accounts with the Treasury do not constitute "payment from the Treasury."

A. The Assets of the FDIC Are Not Public Funds for the Purposes of § 5503

A number of decisions dealing with the specific problem of protecting the assets of the FDIC against fraud and insolvency have described the funds of the FDIC as public funds or public moneys. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 457 (1942); FDIC v. de Jesus Velez, 678 F.2d 371, 375 (1st Cir. 1982); Gilman v. FDIC 660 F.2d 688, 695 n.10 (6th Cir. 1981); FDIC v. Am. Bank Trust Shares, 460 F. Supp. 549, 555 (D.S.C. 1978), aff'd 629 F.2d 951 (4th Cir. 1980).

5/ See Budget of the United States, FY 1985, 8-165 (1984).

However, if the funds of the FDIC were truly public funds, 31 U.S.C. §§ 3302(b),(c) would require that they be deposited with the Treasury, from which they may be withdrawn only "in Consequence of Appropriations made by Law" (Const. Art. I, § 9, cl. 7). Instead, 12 U.S.C. § 1823(a) provides that the moneys of the FDIC, "not otherwise employed shall be invested in obligations of the United States or in obligations guaranteed as to principal and interest by the United States." Section 1823(b) is of particular importance for the issues here involved. According to that provision, the banking or checking accounts of the FDIC shall be kept with the Treasurer of the United States, 6/ or, with the approval of the Secretary of the Treasury, with a Federal Reserve Bank or a bank designated as a depository or fiscal agent of the United States.

Moreover, funds that result from assessments on a specific industry, and that are used to regulate that industry and to pay for the costs of administration, have been held not to constitute public moneys, but rather are trust funds. Varney v. Warehime, 147 F.2d 238, 245 (6th Cir.), cert. denied, 325 U.S. 882 (1945), dealt with a system established during World War II under the War Powers Act that regulated and controlled the milk supply. The system was financed by assessments that were levied on milk handlers and used to pay the salaries of the employees and other expenses necessarily incurred in the administration of the system. This arrangement was challenged on the grounds that the assessments constituted a revenue measure that could be imposed only by statute, and that payment of the expenses and salaries of the system directly out of the fund was a violation of the Appropriations Clause of the Constitution, which requires that all public expenditures be made from the Treasury pursuant to duly enacted appropriations laws. The court rejected those arguments, holding that the assessments did not constitute the levying of a tax or a revenue measure, but rather were incident to the regulation of the industry affected. The Appropriations Clause of the Constitution was held inapplicable because it related only to public funds arising from taxes, customs or other revenue measures, which are required by law to be deposited in the Treasury. The opinion concluded:

> The mere fact that moneys are received by federal agencies in the lawful exercise of their public functions, standing alone, does

6/ There is, of course, a marked difference between a deposit in the Treasury, which can be withdrawn only "in Consequence of Appropriations made by Law," and a checking account, upon which the depositor may draw freely.

not bring them within the constitutional or statutory provision requiring all "public funds" to be covered into the Treasury and withdrawn only by an appropriation.

> The funds accumulated by assessment on the handlers of milk are not public funds, but are trust funds to be retained and disbursed by the Market Agent without deposit to the Treasury of the United States. Morgan's Louisiana & T.R. & S.S. Co. v. Board of Health of State of Louisiana, 118 U.S. 455, 463 [1886].

147 F.2d at 245. 7/

This analysis is equally applicable to the funds collected by the FDIC from its assessments. 8/ The assessments are levied to fund the statutory purposes of the FDIC and the administration of the Act in return for which the banks receive insurance protection for their depositors. The assessments thus are not a tax or revenue measure; moreover, as shown above, the funds of the FDIC are specifically exempted from the requirement of deposit with the Treasury. Finally, the funds of the FDIC are classified in the Budget as trust funds, not as federal funds. We therefore conclude that the funds from which the officers and the employees of the FDIC are paid are not public moneys that must be deposited in the Treasury and may be withdrawn from it only pursuant to appropriations measures.

7/ Morgan v. Louisiana, 118 U.S. 455 (1886), held that a fee collected on vessels entering the port of New Orleans to finance a quarantine system is not a tax in the constitutional sense, but compensation for a service rendered.

8/ In Bryan v. Federal Open Market Committee, 235 F. Supp. 877 (D. Mont. 1964), the plaintiff challenged the Federal Open Market Committee's expenditure of funds in the absence of appropriations. The district court rejected that claim on the authority of Varney v. Warhime, supra, holding that funds lawfully received by a federal agency other than those arising from taxes, customs and other revenue measures, are not subject to the requirement of having to be deposited into the Treasury, from which they could be withdrawn only pursuant to an appropriation. 235 F. Supp. at 879 n.1.

B. The Salaries of the Officers and Employees of the FDIC are not "paid from the Treasury"

Similarly, the salaries of the officers and employees of the FDIC are not "paid from the Treasury" as the result of the method by which they are disbursed. The Department of the Treasury has advised us that, as far as they have been able to determine without direct inquiry to the FDIC, the salaries of the officers and employees of the Corporation are paid in the same manner as the salaries of other government employees -- by checks drawn on the Treasury of the United States. Those checks, however, are not payable out of the general funds, as in the case of the other agencies, but are drawn on separate checking accounts maintained by the FDIC with the Treasury pursuant to 12 U.S.C. § 1823(b).

Payment by a check drawn on the Treasury by a depositor therein arguably is not payment from the Treasury because payment is not made with Treasury funds. While the FDIC funds are physically located in the Treasury, they are not paid "from the Treasury" because the Treasury acts merely as an agent of the FDIC when it pays those checks. 9/ The payments therefore do not come within the prohibition of § 5503.

This conclusion, however, does not fully dispose of your inquiry, since it might be argued that the term "payment from the Treasury" should be given a broad interpretation so as to cover all payments of moneys by the government agencies. However, even assuming such a broad interpretation, Congress could not thereby deny the President the power to make a recess appointment if a vacancy existed while the Senate was in session. At most, Congress could exercise its power under the Appropriations Clause (Art. I, § 9, cl. 7) to prohibit the withdrawal "from

9/ Under the law of negotiable instruments, the drawee of a check is, absent certification or acceptance, under no obligation to pay the payee. The drawee's obligation is owed solely to the drawer of the instrument. Farmers Bank v. Federal Reserve Bank, 262 U.S. 649, 659 (1923). See generally, Banks and Banking (1983 Replacement Volume) §§ 198, 204. In paying the check, the drawee therefore does not discharge an obligation owed by it to the payee, but acts as the drawer's agent in discharging the debt owed by the drawer to the payee. See Selig v. Wunderlich Contracting Company, 160 Neb. 215, 219-20 (1955); Dalmatinsko etc. v. First Union T. & S. Bank, 268 Ill. App. 314, 320 (1932); Wall v. Franklin Trust Co., 84 Pa. Sup. Ct. 392, 394 (1925); Crawford v. West Side Bank, 100 N.Y. 50, 53 (1885); See also 5A Michie, supra, § 1, pp. 15-16.

the Treasury" of funds to pay the salaries of persons who received recess appointments under those circumstances. Even that power might be questioned, 10/ although to our knowledge it has never been challenged. The power of Congress to prohibit the payment of the salaries of recess appointees becomes far more questionable when it is directed not at the withdrawal from the general funds of the Treasury pursuant to an appropriations act, where Congress' power is certainly at its strongest, but rather at the act of payment from trust funds generated not from taxes or other revenue measures, but rather from assessments designed to protect the beneficiaries of a statute and to pay for the expenses of the administration of that legislation. In view of the rule of interpretation that, where fairly possible, statutes are to be construed in a manner which will avoid a constitutional question, Califano v. Yamasaki, 442 U.S. 682, 692-93 (1979); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971), we conclude that § 5503 must be given a narrow construction, and read as prohibiting only payments from the Treasury out of the general funds.

While we believe this is the better interpretation of § 5503, we must caution that, in the absence of any directly applicable precedent, the matter is not completely free of doubt. We understand that your Office realizes that the problems underlying this issue could be obviated according to the second exception to § 5503, supra, if the President were to submit to the Senate a nomination for the position before the recess of the Senate during which the appointment would be made.

Robert B. Shanks
Deputy Assistant Attorney General
Office of Legal Counsel

cc: Wendell G. Willkey, III
Associate Counsel to the President

10/ See, e.g., the concurring opinion of Madden, J., in Lovett v. United States, 104 C.Cl. 557, 594, (1945), aff'd on other grounds, 328 U.S. 303 (1946): "I do not think, therefore, that the power of the purse may be constitutionally exercised to produce an unconstitutional result such as . . . a trespass upon the constitutional functions of another branch of the Government."

APPENDIX

§ 5503. Recess Appointments

(a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply --

(1) if the vacancy arose within 30 days before the end of the session of the Senate;

(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or

(3) if a nomination for the office was rejected by the Senate within 30 days before the end of the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

(b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

THE WHITE HOUSE

WASHINGTON

October 16, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Recess Appointments for Marine Mammal Commission Nominees

Senator Packwood has asked that the President not recess appoint two nominees, Karen Pryor and Robert Elsner, to the Marine Mammal Commission. Susan Borchard of Presidential Personnel has asked whether the statute governing the Marine Mammal Commission prohibits recess appointments.

The question practically answers itself. A mere statute cannot prohibit the President from exercising his constitutional power to make recess appointments. In this case, it is far from clear that Congress even presumed to act in such an unconstitutional manner. Prior to 1982, appointments to the Marine Mammal Commission did not require Senate confirmation. Public Law 92-522, 86 Stat. 1043. The statute was amended in 1982 to provide that "the Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate." Public Law 97-389, 96 Stat. 1951. Senator Packwood now contends that the change evinces an intent to bar recess appointments. But of course the very question of recess appointments only arises with respect to offices requiring Senate confirmation in the first place. To read a provision requiring Senate confirmation as implying an intent to bar recess appointments would mean all recess appointments were prohibited.

Even if Packwood is correct that Congress intended to bar recess appointments when it passed the 1982 amendments, such action by Congress rather clearly contravenes the Constitution. For it is the Constitution, and not any act of Congress, that grants the President the power "to fill up all Vacancies that may happen during the Recess of the Senate." Art. II, § 2, cl. 3. We have never conceded the constitutionality of indirect restrictions on the President's recess appointment power, such as the Pay Act or the effort to draw distinctions between the authority of confirmed and recess-appointed directors of the Legal Services Corporation. We should certainly oppose Packwood's direct effort to prohibit recess appointments.

THE WHITE HOUSE

WASHINGTON

October 16, 1984

MEMORANDUM FOR SUSAN BORCHARD
ASSOCIATE DIRECTOR
OFFICE OF PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Recess Appointments for Marine Mammal Commission Nominees

You have inquired whether the statute governing the Marine Mammal Commission prohibits recess appointments to the Commission. The statute not only does not do so but could not do so consistent with the Constitution. The statute in question simply provides that members shall be appointed to the Commission by the President, with the advice and consent of the Senate. 16 U.S.C. § 1401(b)(1). This hardly evinces an intent to prohibit recess appointments, since the very issue of recess appointments only arises with respect to positions requiring Senate confirmation.

Even if Congress did intend to prohibit recess appointments when it added the requirement of Senate confirmation in the 1982 amendment to the above-referenced statute, it cannot constitutionally do so. The President's power to make recess appointments is granted by the Constitution, Art. II, § 2, cl. 3, and cannot be taken away by a mere statute. I have no doubt that the President is empowered to make recess appointments to the Marine Mammal Commission.

cc: M. B. Oglesby, Jr.
Assistant to the President
for Legislative Affairs

FFF:JGR:aea 10/16/84
bcc: FFFielding/JGRoberts/SUbj/Chron

THE WHITE HOUSE

WASHINGTON

October 16, 1984

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ASSOCIATE DIRECTOR
OFFICE OF PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

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Even if Congress did intend to prohibit recess appointments when it added the requirement of Senate confirmation in the 1982 amendment to the above-referenced statute, it cannot constitutionally do so. The President's power to make recess appointments is granted by the Constitution, Art. II, § 2, cl. 3, and cannot be taken away by a mere statute. I have no doubt that the President is empowered to make recess appointments to the Marine Mammal Commission.

cc: M. B. Oglesby, Jr.
Assistant to the President
for Legislative Affairs

FFF:JGR:aea 10/16/84
bcc: FFFielding/JGRoberts/SUbj/Chron

ID # 265838 CU

FG171

WHITE HOUSE
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JGR - Reviewed legislation
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☐ H - INTERNAL
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Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Susan Borchard

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Recess Appointments for Marine Mammal Commission Nominees

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5/81

THE WHITE HOUSE

WASHINGTON

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October 10, 1984

MEMORANDUM FOR LARRY GARRETT

FROM: SUSAN BORCHARD

SUBJECT: Recess Appointments for Marine Mammal Commission Nominees

Attached is a memorandum from Nancy Kennedy to John Herrington bringing to our attention Senator Packwood's suggestion that the Marine Mammal Commission nominees (Karen Pryor and Robert Elsner) not be recess appointed.

Would you please give me your interpretation of the statute governing the Marine Mammal Commission? Does the statute, in your opinion, prohibit recess appointments? I would appreciate your thoughts on this at your earliest convenience.

Thank you very much for your assistance.

THE WHITE HOUSE

WASHINGTON

October 9, 1984

TO: JOHN HERRINGTON

THRU: M.B. OGLESBY, JR.
PAM TURNER

FROM: NANCY KENNEDY

Again, as was the case earlier this year, the Chairman of the jurisdictional Commerce Committee - Senator Bob Packwood - asks that we not recess the two nominees, Karen Pryor and Robert Elsner.

Enclosed is a tear sheet from the Congressional Record when the members of the Commission became PAS candidates. Based on the Senate's understanding of the intent of the law, Packwood urges Pryor and Elsner not be recess appointed.

cc: Becky Norton Dunlop
Susan Borchard
Nancy Perot

arms buildup but without an arms control treaty.●

APPOINTMENT OF MARINE MAMMAL COMMISSIONERS

● Mr. PACKWOOD. Mr. President, the Senate and House of Representatives recently passed H.R. 3942, a reauthorization of the Commercial Fisheries Research and Development Act. Included in the legislative package was a requirement that all future members of the Marine Mammal Commission shall be confirmed by the Senate. To insure that there is no confusion about the intent of this provision, I want to take this opportunity to add some additional clarification.

First, we are only talking about future Commissioners. The members of the Commission currently in place are not covered by this change in procedure.

Second, the Congress in taking this action is insisting on an orderly transition to the new system of advice and consent appointments to the Commission. Congress intends that the current Commissioners shall continue to serve until they are replaced by a new nominee, or nominees, who have been confirmed by the Senate in the 98th Congress or thereafter.

Third, I want to remind all interested parties that the provision in question is retroactive to September 1, 1982, so that any appointments after that date shall be subject to confirmation by the Senate.●

VERMONT VIETNAM WAR MEMORIAL

● Mr. LEAHY. Mr. President, on October 30, 1982, I stood with hundreds of other Vermonters at the Vermont Vietnam War Memorial. It was a bright fall day, and all of us were brought together to honor the Vietnam veterans.

Certainly one of the most moving statements made that day was by Louise Ransom. She and her husband were there, and she spoke of her son, Mike, who died in Vietnam.

There is no way that I could adequately paraphrase what she said. However, what she said was so important that I will momentarily ask the permission of the Senate to have her remarks printed in full.

I hope that everyone within this body and outside will take these words to heart. Mr. President, I ask that the remarks of Louise Ransom be included in the RECORD in full.

The remarks follow:

DEDICATION OF VERMONT VIETNAM WAR MEMORIAL

(Remarks of Louise Ransom)

My son, Mike, died over fourteen years ago in May of 1968 at Chu Lai, Vietnam. He was an infantryman with the American Division, near My Lai.

I am proud to join you here today to dedicate this most fitting memorial to the young Vermonters who gave their lives in Southeast Asia.

The minister of our church read Archibald MacLeish's poem, "The Young Dead Soldiers" at Mike's funeral. Ted Pickett read it here last Memorial Day at the ground-breaking ceremonies. Its words keep coming back again and again. It begins:

"The young dead soldiers do not speak.
Nevertheless they are heard in the still houses. They say
We were young. We have died. Remember us . . ."

And what is it that we remember?

First, we remember how they looked the last time we saw them—the shiny buttons on their new uniforms pressing into us as we hugged them goodbye, trying to shield them with our love.

We remember how we awaited the letters home. In one Mike wrote: "There is not a man over here that wants to see this war go on any longer. This is not to say that anybody shrinks from doing a job. But everyone is as confused as I as to exactly what, if anything, we're accomplishing."

Then we remember our desperate prayers during those last few days in a surgical field hospital after we had learned of the critical wounds.

We remember sadly now the things that will not be: The weddings never attended; the children never born; the houses never built and the fields not ploughed; the books never written; the songs never sung; even possibly from among those listed here, the Governor or the Senator not elected.

But this is our personal pain. We also remember our national pain:

Our anger at our government:

For covering up so many truths about the war, including how we got into it, and for lacking the courage to pull out, as Senator George Aiken so wisely said we should.

For requiring such unequal sacrifices of its citizens through a system that permitted nine out of every ten men to legally avoid service or ride out the war safely in the very Reserve or Guard units we pay to protect us. If our cause was so righteous and just, how did it happen that no member of Congress lost a son or a grandson there?

For not putting a stop to the huge profits made by American here and in Vietnam at the expense of our soldiers.

For its callous neglect of the returning veterans—other parents' sons—who had been sent off to fight and die in an alien land, in alien ways.

Most of all, we remember our disillusionment:

In the bleak fear that the lives of our beloved sons, husbands, brothers, and some sisters, may have been wasted by the nation we love—for no visible gain to its people.

In the perception that the war brought out the worst in us: our racism, our egotism, our intolerance and our unquestioning chauvinism.

In the knowledge that a whole generation has become cynical and lost faith in their government and in the American dream of freedom for all, for which our fore-fathers fought and died.

But we have not come here today only to remember the painful past. What of the future?

The MacLeish poem goes on to say:

"We leave you our deaths. Give them their meaning."

In our search for meaning, one of the things we do is erect monuments. It is symbolic, I think, of the difference between the Vietnam War and other wars, that this monument was built in memory of their fallen comrades by the veterans themselves, as was the one in Washington, and not in their honor by a grateful nation. The veterans have erected these monuments in their rightful effort to find value and thereby pride in their service.

To me, they have always been deserving of pride and honor, but not because it was a good war. I know that my son and all these others were brave and strong, devoted to their fellow Americans, and to their duty as they saw it. No controversy among us over the war itself can minimize that. If a monument helps veterans to find that pride in themselves, let there be many monuments.

However, the true meaning of these deaths can only be determined by how we, the survivors, regard the monuments and the value we find for ourselves in what they stand for.

If we use them to glorify the Vietnam War, rather than as a tribute to its warriors, righteously feeling that now we have done our bit, (remembering that it is the veterans and not we that put up the monuments) and then wash our hands of the whole tragic business with no concern for its victims at home and abroad, we shall have failed.

But if we can strive mightily to seek creative and not military solutions to overwhelming world problems, if we can acknowledge in humility the possibility of error in ourselves, and above all if we can learn to love one another as we love them, their sacrifice for us will not have been in vain.

A crucial line of the poem reads:

"Whether our lives and our deaths were for peace and a new Hope or for nothing, we cannot say; it is you who must say this."

Future generations will not judge us by our monuments, but rather by our actions. We are proud of our soldiers, all of them. Let us by our actions make them proud of us, that they may rest in peace.●

PIONEERS OF SERVICE

● Mr. HELMS. Mr. President, I am a strong believer in what the people of this great country are capable of doing. They do not need compulsion from Government to stir them into action, but simply the conviction and commitment that come from conscience.

As we all know, the President is also a believer in the American spirit of voluntarism. Addressing a recent conference of volunteers, the President noted that—

These volunteer efforts can do it so much more efficiently . . . so much more effectively than Government can, that it isn't a case of waiting for Government to do it. But take a look at the neighborhood, the community, the thing that needs doing, and then find out how you can enlist people to do this.

I can think of no better example of what the President was talking about, of what America needs more of, than the service project involving the American Children's Home in Lexington, N.C., recently completed by Chapter 79 Telephone Pioneers of America. I salute one and all connected with this project as pioneers in service. Like the pioneers of old they have blazed a path that we would all do well to follow.

Mr. President, I ask that their own account of this commendable achievement be printed in the RECORD at the conclusion of these remarks as evi-

error in the bid upon which a contract is based, that rule does not entitle the Government to take advantage of a bidder's error when, as in the present case, it has been alleged and satisfactorily established prior to award. The general rule is that the acceptance of a bid with knowledge of error therein does not consummate a valid and binding contract. See *Nason Coat Company* v. *United States*, 64 C. Cls. 526; Restatement of the Law of Contracts, section 503; and Williston on Contracts, section 1578. Also, see *Moffett, Hodgkins, and Clarke Company* v. *Rochester*, 178 U. S. 373; *Kemp* v. *United States*, 38 F. Supp. 568; *Alta Electric and Mechanical Company, Inc.* v. *United States*, 90 C. Cls. 466; and 17 Comp. Gen. 575, 576. In undertaking to bind a bidder by aceptance of a bid after notice of a claim of error by the bidder, the Government virtually undertakes the burden of proving either that there was no error or that the bidder's claim was not made in good faith. The degree of proof required to justify withdrawal of a bid before award is in no way comparable to that necessary to allow correction of an erroneous bid.

Since the notice of award was given after receipt of evidence by the contracting officer reasonably establishing the bidder's omission from his bid price of a material item of cost, and since it is understood that the contractor has not executed the contract or furnished a performance or payment bond, the notice of award should be canceled.

The contracting officer's undated Findings of Fact; the affidavits of Mr. Rysgaard; the contractor's original and revised worksheets; and the abstract of bids are being retained. The other papers are returned.

[B-129743]

Appointments—Presidential—Recess—New Appointees

An individual who receives a recess appointment by the President, subsequent to the adjournment of the Senate and after the Senate had failed to act on the nomination of another individual who had received a recess appointment to the same office, is a new appointee, and the salary prohibition in 5 U. S. Code 56 (b) for appointees, other than the nomination of a person appointed during the preceding recess of the Senate, will not preclude payment of compensation to the new appointee.

To Floyd E. Dotson, Department of the Interior, November 30, 1956:

Your letter of November 5, 1956, encloses a voucher in favor of Mr. Olin Hatfield Chilson, Assistant Secretary of the Interior, covering salary for the period October 29 to November 3, 1956, and requests our decision whether the voucher may be certified for payment under the circumstances hereinafter set forth.

You report that a vacancy occurred in the office of the Assistant Secretary of the Interior on September 15, 1955, after the adjournment *sine die* of the 1st session of the 84th Congress; that to fill such vacancy the President gave a recess appointment to Mr. Wesley A. D'Ewart, who entered upon duty on October 6, 1955; that Mr. D'Ewart's name was then placed in nomination for the office before the Senate during the 2nd session of the 84th Congress, but the Senate failed to act upon the nomination prior to the adjournment *sine die* of the Congress on July 27, 1956; that thereafter—Mr. D'Ewart's recess appointment having expired with the end of the 2nd session of the Senate—the President made another recess appointment to the office, but to a different person, namely, Mr. Olin Hatfield Chilson, who entered upon duty on October 29, 1956.

The question presented is whether, in view of section 1761 of the Revised Statutes, as amended by the act of July 11, 1940, 5 U. S. C. 56, Mr. Chilson may be paid salary prior to the time his appointment is confirmed by the Senate.

The referred-to statute reads, as follows:

> No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. The provisions of this section shall not apply (a) if the vacancy arose within thirty days prior to the termination of the session of the Senate; or (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (c) if a nomination for such office was rejected by the Senate within thirty days prior to the termination of the session and a person other than the one whose nomination was rejected thereafter receives a recess commission: *Provided*, That a nomination to fill such vacancy under (a), (b), or (c) of this section, shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

There is for consideration here whether the appointment of Mr. Chilson falls within any of the three exceptions to the general restriction against payment of salary to recess appointees contained in section 1761 of the Revised Statutes, quoted above. It is apparent that if any of the exceptions be applicable in Mr. Chilson's case it is that contained in clause (b), 5 U. S. C. 56 (b), of the statute. While clause (b) appears in the text of section 1761 as previously quoted, it is again quoted here for ready reference:

> (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent.

You refer to the fact that the language "other than the nomination of a person appointed during the preceding recess of the Senate" was

added by the Senate Committee on the Judiciary as an amendment to S. 2773, which became the act of July 11, 1940, amending section 1761 of the Revised Statutes. In explanation of such language, the following statement by the Committee appears in Senate Report No. 1079, 76th Congress:

> The purpose of this amendment is to preclude payment of salary to a person nominated to fill a vacancy during the time when the Congress had adjourned, or was in recess but whose nomination was not sent to the Senate for confirmation during the session of Congress which followed the recess during which the nomination was made, or having been submitted to the Senate, was not acted upon.

Moreover, it is significant that under clause (c), 5 U. S. C. 56 (c), the payment of salary would be permitted to a new recess appointee who is appointed after the rejection by the Senate, within thirty days prior to the termination of the session, of the nomination of a person appointed during the preceding recess.

In view of the foregoing, it is apparent that the Congress did not intend to preclude the payment of salary in a situation such as exists in Mr. Chilson's case, but permit it in a situation as set forth in clause (c) of the statute. Accordingly, we hold that the language "other than the nomination of a person appointed during the preceding recess of the Senate" was not intended to apply to a new recess appointee such as Mr. Chilson and that clause (b) otherwise permits payment of salary under the related circumstances. *Cf.* 28 Comp. Gen. 30; *id.* 238.

The result herein reached is in conflict with our decision of December 14, 1953, B–117860, which no longer will be followed.

The voucher, which is returned herewith, may be certified for payment, if otherwise correct.

Memorandum

Garrett

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Subject	Date
Pay Act -- 5 U.S.C. § 5503.	DEC 21 1984

To
FILES

From
NAME: Herman Marcuse
OFFICE SYMBOL: OLC

STATEMENT:

On December 14, 1984, I received a call from Mr. Garrett, of the Office of the Counsel to the President, involving the interpretation of the Pay Act, 5 U.S.C. § 5503. A member of the Postal Rate Commission had been given a recess appointment during the recess of the Senate between the first and second sessions of the 98th Congress. His nomination had been submitted to the Senate and was pending before it when the 98th Congress adjourned sine die without having taken action on the nomination. Mr. Garrett stated that the President intends to give a recess appointment to another person during the recess of the Senate between the 98th and 99th Congress. He inquired whether that person could be paid prior to confirmation in view of the Pay Act, 5 U.S.C. § 5503.

The Pay act provides in substance that a recess appointee may not be paid out of the Treasury prior to his confirmation, if the vacancy existed while the Senate was in session. This prohibition, however, does not apply (1) . . .

> "(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent."

Mr. Garrett pointed out that the situation described by him fell literally within the exception to paragraph (2), viz., that the nomination of a person appointed during the preceding recess of the Senate was pending before the Senate at the time of the adjournment.

I pointed out to Mr. Garrett that the Comptroller General, the officer primarily charged with the interpretation of the

Pay Act (see 41 Op. Att'y Gen. 463, 469 (1961)), has construed 5 U.S.C. § 5503(2) in analogy to 5 U.S.C. § 5503(a)(3) */ as if it read:

> "If a nomination for the office was pending before the Senate at the end of the session, and a person other than the one who had received a recess appointment to the office during the preceding recess of the Senate receives a recess appointment."

36 Comp. Gen. 444. In the situation described by Mr. Garrett, a nomination was pending before the Senate at the time of its recess, and the recess appointment would go to a person other than a person who had served under a previous recess appointment. The new recess appointee thus could be paid under the interpretation placed by the Comptroller General on the Pay Act.

Mr. Garrett inquired further whether the Pay Act which in terms prohibits payment for services from the Treasury is applicable to the Postal Rate Commission, since the latter is not funded from the Treasury but from postal receipts. On that issue I referred Mr. Garrett to our memorandum dated August 24, 1984, to Mr. Fielding, re: Possible Recess Appointments to the Federal Deposit Insurance Corporation.

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*/ Section 5503(a)(3) provides:

> (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

U.S. Department of Justice

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